No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED et al,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, et al,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes the Free Exercise Clause of the First Amendment protects the right of the Little Sisters of the Poor and other nonprofit corporations to refrain from providing, paying for, or otherwise authorizing or triggering abortion and contraception coverage.

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[1] Pursuant to this Court's Rule 37.3All parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Framers understood the First Amendment to maximize the protection of free exercise of religion throughout this nation. To ensure that protection was not compromised in the modern era, Congress enacted the Religious Freedom Restoration Act to prevent government from substantially burdening free exercise without a compelling interest that cannot be achieved by less restrictive means.

The Little Sisters of the Poor and other petitioners strongly believe that human life is sacred, and they believe human life begins at conception. Accordingly, a law that requires them to provide, pay for, or otherwise authorize or trigger abortion/conception substantially burdens their religious convictions.

Telling the Little Sisters that the alternative method of compliance provision of the Affordable Care Act (ACA) does not substantially burden their free exercise of religion, the Tenth Circuit has in effect defined the Little Sisters' religious beliefs, for it is impossible to conclude that a burden is insubstantial without effectively defining the belief it burdens. And when this decision is read in concert with *Burwell v. Hobby Lobby*, ___ U.S. ___, 134 S.Ct. 2751 (2014), it has the anomalous result of making for-profit corporations more free to be exempt from the ACA than nonprofits.

In reaching this bizarre result, the Tenth Circuit has misunderstood and undermined decisions

of this Court, the Religious Freedom Restoration Act (RFRA), and the Free Exercise Clause of the First Amendment.

ARGUMENT

Introduction

Suppose a person who believes on the basis of religious conviction that all killing is wrong, is ordered by government to shoot a prisoner. He objects that this places a substantial burden on his free exercise of religion. Suppose, further, that this person is given an alternative -- instead of personally killing the prisoner, he can pay another person $1,000 to kill the prisoner. He objects that he is still facilitating murder and this substantially burdens his free exercise.

So then he is given a third alternative: he can receive a so-called accommodation of the killing by signing a paper stating his objection, and someone else will be ordered to kill the prisoner instead. Some might find this acceptable, or at least minimally burdensome, but some would not. Some would say that what matters is not who does the killing, nor who pays for the killing; what matters is that the killing is done at all, and this person's part in authorizing or triggering the killing, regardless of how remote or minimal it may seem to some, compromises and substantially burdens a religious conviction so fundamental as the sanctity of human life.

Amicus suggests that the position of the Little Sisters of the Poor is comparable to that of the person who faces this third alternative – using a so-called accommodation of killing, but by doing so facilitating and triggering abortion/contraception which the Little Sisters believe is a flagrant violation of the sanctity of human life.

Amicus assumes counsel for Little Sisters of the Poor will address the details of the Little Sisters' insurance coverage as compared with that of the other Petitioners. Instead, *Amicus* will address the issue of whether the Affordable Care Act (ACA) imposes a substantial burden upon the Little Sisters by forcing them to use an alternative method of compliance of abortion/contraception coverage and trigger coverage by a Third-Party Administrator (TPA).

I. EVEN IF THE "ALTERNATIVE METHOD OF COMPLIANCE" PROVISION HAS REDUCED THE BURDEN ON FREE EXERCISE OF RELIGION, THE BURDEN IS STILL SUBSTANTIAL.

A previous Tenth Circuit decision cited by the court below is not on point. *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), involved a man who shot an eagle without a permit for use in a tribal religious ceremony. The Tenth Circuit expressed skepticism that the permit requirement constituted a substantial burden but did not decide that issue because Mr. Friday had not raised it.

And the Tenth Circuit's citation and misreading of this Court's recent decision in *Holt v. Hobbs*, ___ U.S. ___, 135 S.Ct. 853 (2015), reflects the Tenth Circuit's misunderstanding of the accommodation requirement regarding the First Amendment, the Religious Freedom Restoration Act (RFRA), and the decisions of this Court. Holt challenged the prison's prohibition on inmate beards, saying the prohibition violated his Muslim faith; prison officials resisted, saying the prohibition was necessary to prevent inmates from concealing weapons. Holt proposed a half-inch beard compromise, which the prison refused but the Court accepted.

The Tenth Circuit reads *Holt* to say that so long as the government has offered an accommodation or compromise, its duty under the First Amendment and RFRA is satisfied. But that is not what this Court said. This Court accepted the accommodation because Holt said it was acceptable, that is, his religion required him to have a beard, the prison's no-beards rule substantially burdened the exercise of his religion, but a requirement that he limit his beard to one-half inch was not a substantial burden as even Holt agreed. In other word, this Court has said the government's accommodation must either eliminate the burden or reduce the burden so it is no longer substantial. In this case, the burden on the Little Sisters is still substantial.

Amicus believes the Tenth Circuit ruling below conflicts with and undermines landmark decisions of this Court, and therefore this Court should reaffirm

these decisions as the true meaning of the First Amendment. Furthermore, the companion cases that the Tenth Circuit decided along with the case at hand, demonstrate that the federal district courts in the Tenth Circuit are split and uncertain about this issue. Moreover, there are innumerable organizations and individuals throughout the nation who are affected by the ACA and need to know whether the ACA applies to them and what it requires of them.

The Tenth Circuit ruling below says the question whether a burden on free exercise of religion is substantial is an objective question that the Court must answer. *Amicus* believes that the question of the substantiality of the burden depends to a very large extent on the nature of the religious belief itself, and therefore the person's or organization's perception of the burden as substantial is entitled to considerable discretion by the courts.

II. THE *BALLARD* DECISION PROHIBITS THE GOVERNMENT FROM CHALLENGING THE OBJECTIVE TRUTH OF A RELIGIOUS CONVICTION.

Two landmark decisions by this Court support our contention that the courts should give very considerable deference to the Little Sisters' claim that the alternative method of compliance requirement imposes a substantial burden on their free exercise of religion. The first of these landmark cases is *Ballard et al. v. United States*, 322 U.S. 78 (1944). *Ballard* had been convicted of mail fraud

because, as the founder and president of the "I Am" movement, he had sent out mailings in which he claimed that he was in communication with angels and had the power to heal persons afflicted with many diseases, and that, in return for a donation, he would intercede on the donor's behalf and heal the donor. The trial court had instructed the jury that they could not consider whether or not *Ballard*'s claims were objectively true, but they could consider whether or not *Ballard* sincerely believed the claims. The jury concluded that *Ballard* did not sincerely believe the claims and therefore they found him guilty of fraud.

Speaking for the Court, Justice Douglas reversed the conviction. Fraud consists of a false statement, known by the defendant to be false, communicated to a third party with intent that the third party act upon that statement to his/her detriment. However, Justice Douglas said, the statement must be objectively false, and because the jury is not authorized to pass judgment on the truth or falsity of a religious statement, they cannot satisfy the first element of fraud. The Court ruled at ___:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679, 728, 20 L.Ed. 666. The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the

chosen form of religion." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be'" Id., 310 U.S. at pages 303, 304, 60 S.Ct. at page 903, 84 L.Ed. 1213, 128 A.L.R. 1352. Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Board of Education by Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The

miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock v. Pennsylvania*,

> 319 U.S. 105, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81. As stated in *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637. "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with." See *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438.

Justice Jackson, in his dissent at *Id.* ___, went even further than Justice Douglas in his insistence that the government may not evaluate or even inquire into a person's religious beliefs and statements:

> ...[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew

something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experiences provide its most reliable answer.

In the second place, any inquiry into intellectual honesty in religion raises profound psychological problems. William James, who wrote on these matters as a scientist, reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. "If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways." If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field

of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among their judges are likely not to understand and are almost certain not to believe him.

And then I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. James points out that "Faith means belief in something concerning which doubt is theoretically possible." Belief in what one may demonstrate to the senses is not faith. All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce. Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more

difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.

There appear to be persons—let us hope not many—who find refreshment and courage in the teachings of the "I Am" cult. If the members of the sect get comfort from the celestial guidance of their "Saint Germain," however doubtful it seems to me, it is hard to say that they do not get what they pay for. Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The Ballards are not alone in catering to it with a pretty dubious product.

The chief wrong which false prophets do to their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. I doubt if the vigilance of the law is equal to making money stick by over-credulous people. But the real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they

are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground. When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt.

I would dismiss the indictment and have done with this business of

> judicially examining other people's faiths.

Subsequent court decisions have followed and enlarged upon the *Ballard* principle. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), this Court refused to intervene in an internal church dispute concerning church discipline, church governance, and the removal of a bishop, holding at 713 that the First Amendment requires the courts to accept the church's decisions "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." Reversing the Illinois Supreme Court, this Court stated further at 708,

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.

The leadership of the Little Sisters of the Poor, like the hierarchy of the Roman Catholic Church to which they belong and to whose authority they submit, has determined that forcing the Little Sisters to name a Third-Party Administrator and thereby authorize that TPA to provide abortion and birth control coverage and trigger that coverage, forces the

Little Sisters to violate their religious beliefs and therefore constitutes a substantial burden upon the exercise of their religious beliefs. By determining that the TPA requirement does not impose a substantial burden upon the Little Sisters' religious beliefs, the Tenth Circuit has taken upon itself the authority of defining the Little Sisters' beliefs and determining what constitutes a substantial burden upon them, and has also placed itself between the Little Sisters and the hierarchy of their order and that of the Roman Catholic Church. In so doing, the Tenth Circuit has exceeded its jurisdiction and its competence.

The First Circuit cited *Milivojevich* in *Natal v. Christian and Missionary Alliance,* 878 F.2d 1575 (1989), in which a pastor challenged his dismissal by the denomination. The First Circuit ruled at 1578,

> We, like plaintiffs, are obligated to accept the Church's decisions "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Eastern Orthodox Diocese,* 426 U.S. at 713, 96 S.Ct. at 2382. Because of the difficulties inherent in separating the message from the messenger—a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents—Natal's case necessarily falls within the scope of the Court's monition. By its

> very nature, the inquiry which Natal would have us undertake into the circumstances of his discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance. It is an inquiry barred by the Free Exercise Clause.

The Tenth Circuit has not questioned the sincerity of the Little Sisters' religious beliefs, but they concluded that the burden imposed upon their beliefs by the ACA was not substantial because of the "alternative method of compliance" provision. However, in so doing, the Tenth Circuit has questioned the nature of the Little Sisters' religious beliefs.

It is impossible to determine whether a law imposes a substantial burden on a person's religious beliefs, without determining what that person believes. Suppose, for example, that Congress passes a bill that prohibits baptism possibly claiming that baptism spreads infectious diseases or causes psychological trauma. That would burden the free exercise of religion for those churches and individuals that practice infant baptism. But would it be a substantial burden? That might depend upon the significance of baptism in various church traditions. Some churches consider baptism to be (A) only a sign or symbol. Others believe baptism is (B) a means of grace by which God conveys saving faith to the recipient. Still others believe baptism is (C) closely related to salvation, or, for a few churches, (D) essential to salvation. Those who believe (A) would

likely say that although baptism is a Scriptural command, the lack of baptism does not affect one's eternal salvation. Those who believe (D) would say baptism or the lack thereof determines one's eternal destiny in heaven or hell. Those who believe (B) and (C) would place the significance of baptism somewhere between (A) and (D).

Applying the substantial burden test, a court might conclude that a law prohibiting baptism is a substantial burden on churches and individuals who believe (D), not a substantial burden for those who believe (A), "sort of substantial" for those who believe (C), and "borderline" for those who believe (B). But in order to reach these conclusions, the court would have to engage in detailed study of the religious beliefs and traditions of each of these churches, recognizing that even within a denomination not all members, pastors, and theologians believe exactly the same.

The Little Sisters claim that providing abortion and contraception coverage violates their religious beliefs and their exercise of those beliefs. Neither the Government nor the Court has questioned the sincerity of their claim. The Little Sisters claim that using an "alternative method of compliance" and thereby transferring the responsibility for coverage to a TPA is a substantial burden on their religious beliefs and their exercise of those beliefs. Rejecting that claim, the Court is in effect saying that either (1) the Little Sisters are insincere in claiming a substantial burden, or (2) the

Little Sisters are incorrect in claiming a substantial burden.

The Tenth Circuit says the question of the party's sincerity is subjective but the question of the substantiality of the burden is objective. However, the substantiality of the burden cannot be determined apart from an understanding of the party's religious beliefs. What is the nature and source of the religious objection? Does the party believe adherence to the law in question would simply be unwise? Does the party believe it would violate the command of the Church? Does the party believe it would violate the command of God?

And what are the consequences of adhering to the law in question? Does it incur eternal damnation? Does it incur Heaven's judgment here on earth? Could it lead to excommunication or other Church discipline? Or is God's disapproval alone enough to incur a substantial burden, for a person who believes obedience to God is one's supreme duty?

And even more to the point, do civil courts have either the competence or the jurisdiction to examine and pass judgment on these questions? And can civil courts analyze and pass judgment on these questions without engaging in the kind of "excessive entanglement" of government with religion that the Court says government should avoid?

To a secular-minded legislator or judge, the simple act of signing a form to use an alternative method of compliance abortion/contraception

coverage may seem too insignificant to constitute a substantial burden. But to parties like the Little Sisters who have devoted their lives to the service of Christ and His Church and who devoutly believe abortion and contraception are anathema in the eyes of God, it seems to be a total betrayal of their Catholic faith. The significance of disobeying God and following the law have to be evaluated in terms of the importance of this tenet as perceived by the party.

Amicus does not deny the theoretical possibility that there could be a case somewhere in which a party claims a burden is substantial when it really is not substantial. But such cases would have to be extremely rare. The very fact that the party is willing to undertake the expense in time and resources, as well as the inconvenience and trauma, of extended litigation in court, should create a presumption that the burden is substantial.

The purpose of this discussion in the light of *Ballard* is to demonstrate that when, as here, a party claims that a law imposes a substantial burden upon the exercise of the party's religious beliefs, and where, as here, there is absolutely no evidence and in fact absolutely no suggestion that the party's claim is insincere, the Court should give very high deference to the party's claim that the law imposes a substantial burden upon the exercise of his or her religious beliefs. The Tenth Circuit did not give that high deference to the Little Sisters' claim, and their decision should therefore be reversed.

III. THE THOMAS CASE HELD THAT COURTS MUST GIVE CONSIDERABLE DEFERENCE TO A PARTY'S CLAIM OF A RELIGIOUS BELIEF.

The Tenth Circuit ruling cites *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), but the Tenth Circuit decision is inconsistent with *Thomas*. A Jehovah's Witness, *Thomas* worked for Blaw-Knox fabricating sheet metal. After that division of the company closed, *Thomas* was transferred to a division that worked on tank turrets, at which time his employment was terminated because he refused to build tank turrets. He claimed unemployment compensation, and his claim was denied because his refusal to work constituted misconduct. He claimed this denial violated the First Amendment because his refusal was based upon his pacifist religious beliefs. He testified at 710:

> Q. And then when it comes to actually producing the tank itself, hammering it out; that you will not do. . . .
>
> A. That's right, that's right when . . . I'm daily faced with the knowledge that these are tanks. . . .
>
> * * * *
>
> A. I really could not, you know, conscientiously continue to work with armaments. It would be against all of the . . religious principles that . . I have come to learn. . . .

The Indiana Supreme Court denied his free exercise claim, stating that the basis for his beliefs was unclear but more a personal philosophical choice than a religious conviction: "A personal philosophical choice, rather than a religious choice, does not rise to the level of a first amendment claim." *Id.* at 713. The Indiana Court concluded that *Thomas* was "struggling" with his beliefs and that he could not "articulate" them precisely. The Court also noted that *Thomas* was unable to articulate why he objected to building tan'

In an 8-1 decision, the U.S. Supreme Court reversed the Indiana Supreme Court. The Court stated at 714,

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. [n7] However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

The lower court noted that *Thomas* was willing to work at the foundry even though the foundry produced steel that would ultimately be used to make weapons. But as this Court observed at 714-15,

...[T]he Indiana court seems to have placed considerable reliance on the facts that *Thomas* was "struggling" with his beliefs, and that he was not able to "articulate" his belief precisely. It noted, for example, that *Thomas* admitted before the referee that he would not object to

> working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . .

271 Ind. at ___, 391 N.E.2d at 1131. The court found this position inconsistent with *Thomas*' stated opposition to participation in the production of armaments. But *Thomas*' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that *Thomas* drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious

> beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

Another Jehovah's Witness also worked on tank turrets for Blaw-Knox. This man testified that he saw no conflict between this work and his religious beliefs and that he had never been admonished, disciplined, or excommunicated because of this work. The lower court reasoned that *Thomas*'s beliefs could not be religious because another adherent of same religion obviously did not share his beliefs. But this Court disagreed, stating at 715-16,

> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise

> is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The Little Sisters claim their objection to providing abortion/contraception coverage is religious. The Tenth Circuit does not deny that their objection is both religious and sincere.

The Little Sisters claim the alternate method of compliance provision also violates their sincere religious convictions. Again, the Tenth Circuit does not deny the sincerity of that claim.

The Little Sisters claim the alternative method of compliance provision constitutes a substantial burden on their religious beliefs -- possibly a lesser burden than would exist if the Affordable Care Act did not include the alternative method of compliance provision, but a substantial burden nevertheless. The Tenth Circuit and the Administration do not deny that the Little Sisters sincerely believe the burden is substantial, but they nevertheless contend that the Little Sisters' belief that the burden is substantial is objectively false. Amicus respectfully contends that the Tenth Circuit is mistaken in this holding.

The nature of a religious belief, and the degree to which a law burdens that belief, cannot be neatly separated. The Little Sisters base their beliefs and practices on the commands of God as revealed through the Roman Catholic Church. They believe they would sin against God and the Church if they were to provide abortion/contraception coverage, and they believe just as sincerely that they would sin against God and the Church if they were to sign an alternative method of compliance form or similar document. They, not the Court, must determine whether signing an alternative method of compliance form is a sin, and if so, how serious a sin.

When the Tenth Circuit tells the Little Sisters this burden is not substantial, the Court is essentially telling the Little Sisters what they believe. The Court is essentially telling the Little Sisters that signing the alternative method of compliance form would not be a serious sin, and that their belief that it is a serious sin is objectively false.

This comes close to telling the Little Sisters what doctrines and practices are central to their faith and what doctrines and practices are not central. This involves a detailed analysis of the Little Sisters' religious doctrine which the Tenth Circuit has neither the competence nor the jurisdiction to undertake.

The centrality of a doctrine or practice may vary from one denomination to another, and may even vary among individuals within the same denomination. Like the example of baptism given earlier, the significance of Communion would vary among denominations and individuals. Roman

Catholics consider the bread and wine of Communion to be the transubstantiated Body and Blood of Jesus Christ. Lutherans consider Communion to be a means of grace involving the "real presence" of Christ in the sacrament. Others such as Baptists generally regard Communion to be only an ordinance and the bread and wine (or grape juice) to be only symbols. Analyzing these doctrines within the broader concept of faith might lead a court to consider Communion a "central" doctrine or practice for Catholics, possibly central for Lutherans, and not central for Baptists. But as this Court recognized in *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."2

And the question of centrality is closely related to the substantiality of the burden. Suppose the government allowed churches to serve Communion but prohibited (or required) the use of wine instead of grape juice. Would that be a substantial burden? To answer that question, a court would have to analyze

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2 The Tenth Circuit cited this case and further quoted this Court as saying "We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one." *Id.* However, the Tenth Circuit failed to note that this Court did not decide the substantiality issue because it based its decision on other considerations.

the nature of the practice of Communion, both generally and in that denomination, the history of that practice, the doctrinal reasons for the practice, and the consequences (in the view of church adherents) of violating that practice. That kind of study is precisely the "excessive entanglement" this Court has said government must avoid, *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The case of *United States v. Seeger*, 380 U.S. 163 (1965), is also instructive, even though the issue was the meaning of "religious" under Sec. 6(j) of the Universal Military Training and Service Act rather than in the First Amendment. The statute provided an exemption from military service for those who were opposed to military service on the basis of "religious training and belief." The Selective Service denied Seeger's claim for conscientious objector status, contending that his beliefs were not religious because the Act spoke of "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." Seeger' and his co-plaintiffs did not claim to believe in a "Supreme Being" although he did believe in a "Supreme Reality." But this Court stated at 165-66,

> We have concluded that Congress, in using the expression "Supreme Being," rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or

> philosophical views. We believe that, under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders, we cannot say that one is "in a relation to a Supreme Being" and the other is not.

Seeger demonstrates an inclination of this Court to defer substantially to a person or a religious group in determining the nature of their religious beliefs. The conscientious objection that was provided to Seeger because of his objection to killing in warfare, should also be provided to the Little Sisters because of what they perceive to be the killing of unborn children.

The Tenth Circuit has no constitutional authority to tell the Little Sisters what they believe, what aspects of their beliefs are central, what constitutes a burden on their beliefs, or how substantial those burdens may be. Unless there is evidence that the Little Sisters are insincere -- and there is none -- their claim that the alternative method of compliance out form still constitutes a substantial burden must be given very considerable deference. To paraphrase what this Court said in *Thomas*, there could be a claim of substantial burden that is so bizarre, so obviously contrived, and so obviously insincere, as not to be entitled to First

Amendment protection; but that is not the case here. Courts are not arbiters of scriptural interpretation, and the Tenth Circuit must not be allowed to tell the Little Sisters what they believe.

IV. THE DECISION BELOW MEANS NONPROFIT CORPORATIONS HAVE LESS RELIGIOUS FREEDOM THAN FOR-PROFIT CORPORATIONS.

If the Tenth Circuit decision is allowed to stand, the result would be an anomaly. This Court held in *Burwell v. Hobby Lobby*, that a for-profit closely-held corporation is entitled to an exemption from providing abortion/contraception coverage in violation of its religious beliefs. Although the reason is partly based on the wording of the Affordable Care Act itself, the result of this Court's *Hobby Lobby* decision coupled with the Tenth Circuit's Little Sisters decision is that for-profit closely-held corporations are exempt from this coverage but nonprofit corporations must sign an alternative method of compliance form, meaning for-profit corporations have greater First Amendment protection than nonprofit corporations, all for abortion/contraception coverage that most of the Little Sisters' employees probably do not need or want and are offended that it has to be part of their policies. This certainly cannot be the intent of the Framers of the First Amendment, nor of the Congress that adopted the Affordable Care Act, nor of this Court.

V. EXEMPTING THE LITTLE SISTERS FROM THIS ACA MANDATE IS A LESS RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S INTEREST.

Because the ACA is federal legislation, it is subject to the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S. C. Sec. 2000bb - 2000bb-4, which prohibits federal legislation that substantially burdens one's free exercise of religion unless the government can demonstrate a compelling interest that cannot be achieved by less restrictive means. The constitutionality of RFRA as applied to the federal government was unanimously upheld by this Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

In *Hobby Lobby v. Burwell,* this Court held that exempting Hobby Lobby, a for-profit closely-held corporation, from the ACA mandate was a less restrictive means by which the government's interest in ACA could be fulfilled. Surely, then, exemption from this ACA mandate is an equally acceptable or more acceptable means of fulfilling the government's interest in ACA as applied to a nonprofit religious corporation like the Little Sisters, most of whose employees, we may assume, share the Little Sisters' religious and moral convictions about abortion and contraception, do not want abortion and contraception coverage, will not use abortion and contraception coverage, and resent having abortion and contraception coverage forced upon them.

CONCLUSION

Throughout this nation, individuals, nonprofit organizations, and government officials are looking for guidance concerning the implementation of these provisions of the Affordable Care Act. The Tenth Circuit has given them a convoluted ruling that results from conflicting district court decisions, that conflicts with *Ballard*, *Thomas*, and *Hobby Lobby*, and that leaves the consciences of the Little Sisters and others violated and compromised.

In other cases, this Court has expressed concern about communicating a message of animus or exclusion toward certain groups in society. For example, various religious activities like graduation prayers and religious displays have been held unconstitutional because, as this Court said in *Lee v. Weisman,* 505 U.S. 577 (1992), they may communicate a "message of exclusion to all those who do not adhere to the favored beliefs." *Id.* at 606. (Justices Blackmun, Stevens, and O'Connor, concurring). In another field, that of same-sex marriage, this Court recently held in *United States v. Windsor,* 123 S.Ct. 2675 (2013), and *Obergefell v. Hodges,* ___ U.S. ___ (2015), that laws evincing an animus toward homosexuals are unconstitutional because they exclude homosexuals from having their part in the institution of marriage which is so central in American society. Courts have expressed concern about sending a "message of exclusion on other matters, including advertisements with exclusively white models, *Housing Opportunities Made Equal, Inc., v. Cincinnati Enquirer, Inc.,* 943 F.2d 644, 658

(C.A. 6 (Ohio)), 1991), and deliberately choosing to speak to someone in a language that he or she does not understand, *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 935 fn 20 (A.A.9 (Ariz.), 1995).

Amicus respectfully suggests that the Tenth Circuit has sent a "message of exclusion" to the Little Sisters of the Poor and to others who share their beliefs. The Little Sisters believe that the unborn child is a living human person and therefore oppose abortion and birth control. They further believe that designating a TPA triggers abortion coverage and thereby encourages and facilitates the act of abortion which they consider to be killing an unborn child, and they therefore believe that forcing them to designate a TPA is a substantial burden on their religious beliefs. By telling them this is not a substantial burden, the Tenth Circuit has essentially told the Little Sisters that their beliefs about the designation of a TPA are wrong.

Unlike the plaintiffs in these Establishment Clause cases, the Little Sisters do not ask this Court to strike down the Affordable Care Act, not even those portions of the Act that impose a mandate requiring abortion and birth control coverage. They ask only that they be exempted from that mandate. To deny them this exemption is to relegate them to second-class status and to communicate the message that their religious views and practices are unacceptable and out of place in American life and society.

As this Court recognized in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), accommodation of religious

needs (in that case, released time for religious instruction) is constitutionally appropriate:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. to hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

One appropriate way to accommodate people's religious needs is to exempt those with sincere religious convictions from certain general requirements, as this Court recognized in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (in that case, dealing with Amish objections to compulsory school attendance requirements). As the Court stated at 220, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Exemptions to certain legal requirements are sometimes the best and maybe the only way religious and nonreligious majorities and minorities can co-exist harmoniously in a common society.

And that is all the Little Sisters are asking -- exemption from a requirement that violates their sincere and deeply-held religious beliefs.

Amicus urges this Court to reverse the decision of the Tenth Circuit and issue a clear ruling that protects the Little Sisters' constitutional right to free exercise of religion and establishes that nonprofit organizations have at least as much protection under the Free Exercise Clause as do for-profit corporations.

Respectfully submitted, this the 11th day of January, 2016.

/s John A. Eidsmoe
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